UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GEORGE EDWARD WEEKS, Petitioner,	:
-vs-	: Civ. No. 3:01cv2165 (PCD)
JOHN ASHCROFT, Attorney General of the United States, *et al.*, Respondents.	:

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, appearing pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that his order of removal and continued detention by respondent Immigration and Naturalization Service (INS) violate his right to due process of law as guaranteed by the Fifth Amendment. For the reasons set forth herein, the petition for writ of habeas corpus is denied.

I. BACKGROUND

Petitioner is a citizen of Nevis, West Indies. On October 31, 1974, he became a lawful permanent resident of the United States. On September 9, 1997, petitioner was convicted of possession of narcotics with intent to sell in violation of CONN. GEN. STAT. § 21a-277(a)[1] and was sentenced to four years' imprisonment. On October 19, 1999, the INS notified him that he was

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[1] Section 21a-277(a) provides that "[a]ny person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

subject to deportation pursuant to § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(A)(iii), for conviction of an aggravated felony involving drug trafficking.

On September 11, 2000, an Immigration Judge (IJ) ordered petitioner removed. Petitioner did not appeal the order to the Board of Immigration Appeals (BIA).[2] Petitioner then filed the present petition for writ of habeas corpus.

II. DISCUSSION

Petitioner raises three arguments in support of his petition.[3] First, he argues that the crime of which he was convicted does not meet the definition of aggravated felony and thus the order violates due process. Next, he argues that he is subject to indefinite detention pursuant to § 241 in violation of due process.[4] Third, petitioner argues that the amendments limiting his ability to obtain waiver of the order of removal pursuant to §§ 212(c) and 212(h) of the INA violate due process through their retroactive application. Each will be addressed in turn.

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2 The order became final upon petitioner's failure to file a notice of appeal of the IJ's order to the BIA within the prescribed thirty-day time limit. *See* 8 C.F.R. §§ 3.38, 3.39.

3 Petitioner submits his petition *pro se*. As such, his petition will be construed broadly and interpreted as raising the strongest arguments suggested therein. *See Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000). Inartful pleading is an insufficient basis on which to refuse review or improperly limit review of his claims. *See Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

4 Petitioner argued in his petition that his continued detention pursuant to § 236 violated his right to due process before changing the allegation to § 241 in his response to respondent's reply to the order to show cause. The final order of deportation, as discussed in *supra* footnote 2, represents the demarcation between procedures governed by §§ 236 and 241 of the INA. Detention prior to the issuance of a final order of deportation is governed by § 236. *See Patel v. Zemski*, 275 F.3d 299, 304 n.3 (3d Cir. 2001). Detention following a final order of deportation is governed by § 241, 8 U.S.C. § 1231(a)(6). *See id*. In deference to petitioner's *pro se* status, his claim will be construed as alleging a due process violation through § 241 procedures. *See Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

A. Propriety of the Order of Removal

Petitioner argues that his order for commission of an aggravated felony is violative of due process as his conviction for violation of CONN. GEN. STAT. § 21a-277(a) does not meet the definition of a crime involving drug trafficking. Respondent replies that there is no jurisdiction to review his claim because he failed to exhaust administrative remedies available through an appeal to the BIA.

Generally, an alien is required to exhaust all claims before seeking judicial review of a final order of removal. *See* 8 U.S.C. § 1252(d)(1)("[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"). However, when the issue is of constitutional magnitude and the agency is not empowered to review such claims, exhaustion would not necessarily be required. *See* Howell v. INS, 72 F.3d 288, 291 (2d Cir.1995); *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994); *Xiao v. Barr*, 979 F.2d 151, 154 (9th Cir. 1992). The BIA does not have jurisdiction to address constitutional claims. *See Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994). The determination as to whether exhaustion stands as a bar to habeas review of due process claims therefore rests on whether "the administrative forum would provide no real opportunity to present the constitutional issues raised." *Xiao*, 979 F.2d at 154.

The present claim may not be characterized as a constitutional claim beyond the jurisdiction of the BIA to resolve. At best, it is an alleged due process violation premised entirely upon a misinterpretation of a statute, specifically whether a state criminal conviction constitutes a crime involving drug trafficking. The BIA was well within its jurisdiction to resolve the alleged misinterpretation and has frequently done so. *See, e.g., Aguirre v. INS*, 79 F.3d 315, 316 (2d Cir. 1996). Petitioner will not be permitted to forego the exhaustion requirement by placing a constitutional

label on a matter of statutory interpretation, as such a practice would render the exhaustion requirement nugatory. As petitioner failed to exhaust available remedies with the BIA, this Court is without jurisdiction to review the alleged mischaracterization of his conviction as an aggravated felony.

B. Continued Detention

Petitioner argues that his continued detention violates his Fifth Amendment right to due process of the law.[5] Respondent replies that petitioner's native country accepts deportees, thus the only reason petitioner has not been deported is because he is contesting the IJ's decision.

It is beyond question that the indefinite detention of an alien after an order of removal issues raises a serious constitutional problem. *See Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Detention may be for no longer than "a period reasonably necessary to secure removal," *id.* at 699, and a six-month period of detention is presumed reasonable and consistent with due process. *See id.* at 701. Should the period of detention exceed six months and the alien provide good reason to believe that there is not a significant likelihood of removal in the

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[5] Petitioner also alleges that his right to procedural due process was violated but provides no indication that he has utilized the procedures set forth in 8 C.F.R. § 241.4 for obtaining supervised release. The relevant procedures detention and supervised release for a § 241 detainee are as follows. The INS has ninety days from the date of a final order of removal to deport an alien. *See* 8 U.S.C. § 1231(a). An alien ordered deported pursuant to 8 U.S.C. § 1227(a)(2) may be detained beyond the mandatory ninety-day period. *See* 8 U.S.C. § 1231(a)(6). Review of detention for the next three months is made by the INS District Director, *see* 8 CFR § 241.4(c)(1), or, on referral by the District Director, by the Headquarters Post-Order Detention Unit (HQPDU), *see* 8 CFR § 241.4(c)(1). HQPDU conducts all reviews after the six-month period following a final order of removal. *See id.* Although petitioner argues that he was denied procedural due process in his continued detention, he nowhere indicates that he sought supervised release through the aforementioned procedures. "'[C]onclusory,' 'vague,' or 'general allegations,'" of conspiracy to deprive a person of constitutional rights, *see Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981), are an insufficient basis on which to grant habeas relief. Notwithstanding petitioner's *pro se* status, he must provide some evidence that the procedures in place were inadequate to prevent a deprivation of a liberty or property interest. *See Smalls v. Batista*, 191 F.3d 272, 278 (2d Cir. 1999). An unsupported allegation of a procedural due process violation is not sufficient.

reasonably foreseeable future, then the Government must provide evidence establishing otherwise. *See id.* "[A]s the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id*.

Petitioner was ordered removed on September 11, 2000. His order of removal thus became final on October 12, 2000. *See* 8 U.S.C. § 1231(a)(1)(B); *supra* footnote 2. Neither petitioner nor respondent indicate that he has been released from detention since the order of removal became final. The present petition was filed on November 19, 2001. The ruling denying petitioner's motion for stay of deportation issued eight days later.[6] Petitioner has therefore been in post-removal custody for in excess of nineteen months and there is no indication that his native country will not accept him.

Respondent argues that "petitioner has failed to demonstrate that his removal is not reasonably foreseeable; indeed, he has not, as required by *Zadvydas*, come forward with any evidence that the INS is unable to deport him. Rather, he can easily be deported and the INS is prepared to do so as soon as the Court dismisses the instant petition." *Zadvydas* requires only that petitioner "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Petitioner's nineteen months of post-removal detention in the absence of a judicial stay of removal supports his argument that he has good reason to believe that his removal is not likely in the reasonably foreseeable future.

Respondent's contention that petitioner must first produce evidence that the INS is unable to deport him before it must produce concrete evidence of some sort that he is to be removed in the

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[6] It has been the practice of this Court to impose the following duty on respondent and the INS, as stated in the ruling denying the motion for stay of deportation in the present case: "respondents shall advise the court of any intention to execute an order of deportation of petitioner." This notification in no way hinders the ability of the INS to execute a lawful removal order.

reasonably foreseeable future misapprehends *Zadvydas*. The decision in *Zadvydas* was not limited to determining the due process rights of those aliens whose countries refused to accept their return but rather addresses whether an "indefinite and potentially permanent" detention offends due process. *Id.* at 696. An alien whose country would accept his return would never be in a position to establish a due process violation under this reasoning, regardless of the length of the period of post-removal detention. Although the inability to remove an alien is certainly evidence of the unlikelihood of removal in the reasonably foreseeable future, so too is an excessive period of post-removal detention. Petitioner need only provide good reason to believe that removal is not reasonably foreseeable, at which point the Government must provide evidence to the contrary.

Respondent also argues that petitioner has caused the delay in execution of his order of removal and thus may not claim a due process violation for the resulting delay. It is without question that a lengthy period of detention will not violate due process if the petitioner's actions are to blame for the delay. *See Doherty v. Thornburgh*, 943 F.2d 204, 210-12 (2d Cir.. 1991); *Dor v. District Director*, 891 F.2d 997, 1002 (2d Cir. 1989). The cases cited by respondent, specifically *Guner v. Reno*, 2001 WL 830673 (S.D.N.Y. July 23, 2001); *Copes v. McElroy*, 2001 WL 830673 (S.D.N.Y. July 23, 2001); *Lawrence v. Reno*, 2001 WL 812242 (S.D.N.Y. July 18, 2001), simply restate this proposition in the context of delays in removal resulting from a petitioner's obtaining judicial stay of removal orders. In the present case, there is no judicial stay in effect. If respondent's argument is interpreted as an indication that it willingly halted the removal process to afford petitioner his day in court, then there is a benign justification for some of the delay involved. However, respondent may not attribute the delay to petitioner when the same was neither directly asked for by him nor ordered by this

Court. Moreover, the period of time attributable to the habeas petition does not account for the majority of the delay prior to the filing of the petition, which encompasses a period in excess of a year for which respondent provides no explanation. Petitioner therefore is not prevented from alleging a due process violation for excessive detention.

Having established good reason to believe he will not be deported, respondent must rebut the presumption that petitioner will not be removed in the reasonably foreseeable future. Respondent replies that petitioner "can easily be deported and the INS is prepared to do so as soon as the Court dismisses the instant petition." If this were to be interpreted as a claim that removal is possible without more, respondent would be deemed to have failed to sustain its burden in controverting petitioner's allegation. However, the more likely interpretation is that it constitutes a representation to this Court that the INS will immediately process petitioner for removal on receipt of this ruling. The representation suffices to defeat the alleged due process violation by establishing that petitioner will not be detained indefinitely. However, in dismissing this petition hereby, petitioner's right to reopen this aspect of his petition will be reserved to him in the event of a continued failure of respondent to end his detention and carry out his deportation within sixty (60) days of this order.

C. Waiver pursuant to 212(c) and 212(h)

Petitioner argues that he is entitled to an order remanding his case to the IJ for consideration of relief under § 212(c) and § 212(h) because the sections are unconstitutional as retroactively applied to him. This argument is without merit.[7]

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[7] There is no indication that petitioner actually sought a waiver of removal through either § 212(c) or § 212(h), nor any evidence that he declined to do so because the change in laws made it a futile endeavor. Petitioner alleges only that "[t]he INS initiated removal proceedings against petitioner and he was order[ed] to be remove[d] from the United States by an Immigration Judge in Oakdale, Louisiana, on Sept. 11, 2000, of which he *did not make an appeal*." (Emphasis in original).

Petitioner's allegation addresses the retroactive effect of the amendments repealing § 212(c) waivers and eliminating the possibility for § 212(h) waivers for crimes involving drug trafficking through § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted on April 24, 1996), and §§ 304(a) and 348 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-597 (enacted on September 30, 1996). The permanent provisions of the IIRIRA went into effect on April 1, 1997. *See* IIRIRA § 309(c)(1)(A). AEDPA went into effect when enacted. *See Domond v. United States INS*, 244 F.3d 81, 83 (2d Cir. 2001)

Petitioner's argument is similar to that addressed in *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), with one important distinction. *St. Cyr* involved the retroactive application of the IIRIRA provision repealing § 212(c) to those who entered into plea bargains with the understanding that waiver was probable. *See id.* at 297. The Supreme Court ruled that "§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326. Its holding is inapposite as petitioner points to no event, either in his conviction or in his removal proceedings, that took place before either act went into effect. *See Domond*, 244 F.3d at 85-86 (conviction is relevant date for purposes of analyzing retroactive effect of amendment).

Petitioner was convicted on September 9, 1997, well after the changes enacted by AEDPA and the IIRIRA went into effect on April 24, 1996 and April 1, 1997, respectively. There thus can be no due process violation resulting from the retroactive application of the amendments to petitioner as all

proceedings relevant to the order of removal, including his criminal conviction and removal hearing, transpired after the amendments went into effect.[8]

III. CONCLUSION

The petition for writ of habeas corpus (Doc. 1) is **denied**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, May ___, 2002.

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Peter C. Dorsey
United States District Judge

[8] If petitioner's argument is construed as an attack on the constitutionality of the amendments, he is without standing to make such an argument. In order to establish standing, petitioner must demonstrate injury in fact, which entails an invasion of a legally protected interest which affects him in a personal and individual way. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). His entitlement to waiver and the classes of crimes constituting an aggravated felony were firmly in place at the time of his conviction. He thus cannot demonstrate an injury personal to him as a consequence of the various amendments and thus lacks standing to raise a due process violation resulting from the amendments. *See Galindo-Del Valle v. Attorney General*, 213 F.3d 594, 598-99 (11th Cir. 2000).